No. 91-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RAYMOND MIRELES,
Petitioner,
vs.
HOWARD WACO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH R. MANES
Counsel of Record

MANES & WATSON

Suite 1710
3600 Wilshire Boulevard
Los Angeles, California 90017
(213) 381-7793

SAM ROSENWEIN
Of Counsel

Attorneys for Respondent

Lawyers Brief Service • Appellate Brief Printers • (213) 383-4457 • (714) 720-1510

QUESTIONS PRESENTED

1. Does a judge who orders two police officers to bring into his courtroom forcibly and with excessive force an attorney then appearing in another courtroom, and who, upon observing the officers bring such attorney into his courtroom with unnecessary and unreasonable force, "knowingly and deliberately ratifies" that conduct, act without and in the absence of any jurisdiction?

2. Does a judge have absolute immunity when, in open court, he orders a police officer to use excessive force on an attorney, and when he subsequently ratifies such use of unreasonable force by the officer?

LIST OF PARTIES

Petitioner: RAYMOND MIRELES--Defendant-Appellee Waco v. Baltad, 934 F.2d 214 (9th Cir. 1991), United States Court of Appeals Ninth Circuit No. 90-55683; Waco v. Baltad, et al., United States District Court Central District of California No. CV 89-6970-TSH. Petitioner is a judge of the Superior Court of the State of California for the County of Los Angeles.

Respondent: HOWARD WACO--Plaintiff-Appellant Waco v. Baltad, 934 F.2d (9th Cir. 214 1991), United States Court of Appeals Ninth Circuit No. 90-55683; Waco v. Baltad, et al. United States District Court Central District of California No. CV-89-6970-TSH. Respondent is a Los Angeles County Deputy Public Defender.

While two additional defendants are parties to action No. 89-6970-TSH on file in the United States

District Court for the Central District, they were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit of California, those defendants are Gregory Baltad and Nicholas Titiriga, officers of the Los Angeles Police Department.

No corporation is a party to the proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page:**

No. 91-311

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, HOWARD WACO, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 934 F.2d 214 (1991).

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in the official reports as *Waco* v.

Baltad, 934 F.2d 214 (CA9, 1991) and is contained in Petitioner's Appendix. The United States District Court issued no written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 24, 1991.

The Petition for Writ of Certiorari was received by Respondent on the 20th of August, 1991.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case:

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

REASONS WHY THE WRIT SHOULD BE DENIED

I.
THE RECORD AND THE DECISION BELOW ARE IGNORED IN THE QUESTIONS PRESENTED IN THE PETITION.

The Petition overlooks the rule, cited in the Ninth Circuit's Opinion, that in reviewing the dismissal of a complaint for failure to state a claim, "the allegations are taken as true and are construed in the light most favorable to the non-moving party." (Pet. A-3).

The question presented, therefore, is not merely whether the judge acted "unreasonably," or duly performed" a judicial function" (Pet. i), but whether the judge acted in the **clear absence** of all jurisdiction when

he "ordered" two police officers "to forcibly and with *excessive force* seize and bring" into Petitioner's courtroom the respondent, an attorney then appearing on behalf of another client before another judge in session down the hall, (Pet. B-3) (emphasis supplied); and when, pursuant to petitioner's orders said police officers do just that, and "by means of unreasonable force and violence" seized respondent, dragged him backwards down the hall, (Pet. B-4) then "deliberately, recklessly and without necessity slammed" respondent "violently against and through the doors" of the courtroom and through the inner swinging gates of the courtroom, all in the presence and view of petitioner who, seated upon his bench in open court, thereupon "knowingly and deliberately approved and ratified each of the aforedescribed acts" of excessive force of the two police officers (Pet. B-4).

a) The Ninth Circuit Opinion initially stated that judges may be absolutely immune from section 1983 liability for damages only for their *judicial* acts, "and not for other administrative, legislative or executive functions that they may perform" (Pet. A-3). The Opinion states that judges are subject to liability "when they act in the clear absence of all jurisdiction," citing this Court's decision in *Stump* v. *Sparkman*, 435 U.S. 349 at 356-57, 98 S.Ct. at 1105 (1978) (Pet. A-3). In its opinion, the Ninth Circuit noted that it had previously held that a judge who himself uses physical force to preserve order, loses his immunity, citing *Gregory* v. *Thompson*, 500 F.2d 59 (1974). In the same case the Ninth Circuit suggested that "a judge also

could lose his immunity if he directed a sheriff or bailiff to use excessive force" (Pet. A-4). The Ninth Circuit therefore impliedly recognized that the use of excessive force, or directions to use excessive force by police officers, in circumstances such as were alleged in the complaint herein, and legally admitted, could not possibly be condoned. The Ninth Circuit concluded that if respondent "requested and authorized the use of excessive force, then he would not be acting in his judicial capacity" (Pet. A-5), and ruled: "Taking the allegations in Waco's complaint as true, we cannot say that he can prove no set of facts in support of his claim" (Pet. A-5). The judgment of dismissal was reversed and the case remanded (Pet. A-5). Decision must await a full trial before an appropriate trier of the facts.

II.

THE PETITION PRESENTS NOT A SINGLE DECISION OR STATUTORY PROVISION WHICH AUTHORIZES A GRANT OF IMMUNITY TO A JUDGE WHO DIRECTS AND RATIFIES THE USE OF EXCESSIVE FORCE, AS OUTLINED IN THE COMPLAINT, ALL MATERIAL FACTS ALLEGED HAVING BEEN ADMITTED BY PETITIONER'S MOTION TO DISMISS THE COMPLAINT.

The petitioner's citations deal solely with the general rules respecting absolute immunity for judges--when the function performed is normally performed by a judge

and is dealt with in his judicial capacity, and even when the acts of the judge are in excess of jurisdiction, and are alleged to have been done maliciously or corruptly. But the Petition cites not a single decision suggesting that a judge enjoys immunity when he directs the use of excessive force, and approves the use of force and violence as in the case herein.[1] In what follows, respondent briefly notes the rulings in each of the cases cited in the petition.

Bradley v. *Fisher*, 13 Wall 335, 20 L.Ed. 646 (1872) (lawyer insulted the judge and judge ordered lawyer stricken from rolls of court) (Pet. p. 5).

Stump v. *Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (failure to afford appropriate notice and hearing on sterilization issue. See fn. 10 referring to *Gregory* v. *Thompson*, 500 F.2d 59 (9th Cir., 1974) (Pet. pp. 5-6)).

---

[1] On the other hand, compare: *Zarcone* v. *Perry* 572 F.2d 52 (2nd Cir. 1978) which, at p. 57, characterizes a judicial abuse of power as intolerable where a judge ordered a sheriff to bring before him in handcuffs a coffee vendor who the judge then subjected to an inquisition all because he did not like the vendor's coffee. Compare also: *Lopez* v. *Vanderwater* 620 F.2d 1229, 1235-1237 (7th Cir. 1980) holding a judge liable for damages where he filed criminal charges against plaintiff, forged plaintiff's signature on a guilty plea, and then caused plaintiff to be brought up before him upon an unconstitutional conviction.

Forrester v. *White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (Judge hired petitioner as probation officer; then fired her. Administrative decision held not entitled to absolute immunity. Question of qualified immunity not reached) (Pet. 6-7, 8-9).

Harlow v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) [2] (President enjoys absolute immunity; aides are entitled only to qualified immunity).

Anderson v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (federal law officer participates in an illegal search in violation of Fourth Amendment; held, entitled to qualified immunity only) (Pet. p. 10).

Dennis v. *Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 Ed.2d 185 (1980) (Judge issued an injunction--claim of corruption).

The lower court decisions cited in the petition also are not relevant: *Slotnick* v. *Garfunkle*, 632 F.2d. 163 (1st Cir. 1980) (contempt proceeding) (Pet. p. 11); *Green* v. *Maraio*, 722 F.2d 1013 (2nd Cir. 1983) (reporter and trial judge--claim of altering trial transcript) (Pet. p. 11); *Albright* v. *R. J. Reynolds Tobacco Co.*, 463 F.Supp. 1220 (W.D. Pa. 1979) (Claim of bias against plaintiff--judge approves ruling on Gregory) (Pet. p. 11); *Liles* v. *Reagan*, 804 F.2d 493

---

[2] There appears to be a typographical error in the petition. The citation should be 457 U.S., not 475 U.S.

(8th Cir. 1986) (defendant found in contempt of court and jailed) (Pet. 11-12); *Dykes* v. *Hosemann*, 776 F.2d 942 (11th Cir. 1985) (mother and son sue father and juvenile judge--charge of conspiracy to deprive constitutional rights) (Pet. p. 12); *Holloway* v. *Walker*, 765 F.2d 517 (5th Cir. 1985), cert. den. 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985) (control of oil company--charge of bribe and conspiracy) (Pet. p. 12); *Ashelman* v. *Pope*, 793 F.2d 1072 (9th Cir. 1986) (defendant claims conspiracy by judge and prosecutor to deprive defendant of constitutional rights while defending himself in a criminal prosecution.) (Pet. p. 12)

Finally, it should be noted that petitioner concedes that "some acts within the authority of a judge may be non-judicial" (Pet. p. 9). The petitioner concedes that the Ninth Circuit ruling in *Gregory* v. *Thompson*, *supra* was correct. There is no absolute immunity for a judge who "came down from the bench and physically ejected a lawyer from the courtroom" (Pet. p. 9). But, argues the petitioner, when the judge "orders" police officers to use excessive force and drag a lawyer from one courtroom to the judge's courtroom, the police officers using force and violence all the way with the judge's approval, that order, the petitioner asserts, is within a judge's jurisdiction. The petitioner avoids quoting the actual directions of the judge, and fails to recognize that a judge who acts in a manner that precludes all resort to appellate or judicial remedies, who acts as if he were a police chief issuing orders to his men, can hardly deny that his actions were in clear absence of all jurisdiction.

CONCLUSION

For the aforesaid reasons, the petition for a writ of certiorari should be denied.

DATED: September 3, 1991

Respectfully submitted,

HUGH R. MANES
Counsel of Record
for Respondent HOWARD WACO

MANES & WATSON
3600 Wilshire Blvd., Ste. 1710
Los Angeles, California 90010
TELEPHONE: (213) 381-7793
Counsel for Respondent

SAM ROSENWEIN
Of Counsel